

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-9445-94

MTStabile

date:

to: District Director, Manhattan District
Attn: [REDACTED]
Manager, Group [REDACTED]

from: District Counsel, Manhattan

subject: Request for Advice U.I.L. 6229.02-00, 6231.03-00,
[REDACTED] 6501.08-00
Extension of Statute of Limitations
Taxable Year: [REDACTED]

STATUTE OF LIMITATIONS EXPIRES: [REDACTED]

THIS DOCUMENT MAY CONTAIN TAXPAYER INFORMATION SUBJECT TO I.R.C. § 6103. THIS DOCUMENT MAY ALSO CONTAIN CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE, DELIBERATIVE PROCESS PRIVILEGE AND ATTORNEY WORK PRODUCT PRIVILEGE. ONLY OFFICE PERSONNEL WORKING THE SPECIFIC CASE OR SUBJECT MATTER MAY USE THIS DOCUMENT. THIS MEMORANDUM SHALL NOT BE DISCLOSED OR CIRCULATED BEYOND SUCH OFFICE PERSONNEL HAVING THE REQUISITE "NEED TO KNOW." FURTHERMORE, IN NO EVENT SHALL THIS DOCUMENT BE DISCLOSED TO THE TAXPAYER OR ITS REPRESENTATIVE.

This memorandum is in response to your request for assistance in obtaining waivers to extend the statute of limitations for [REDACTED]'s ("the partnership" or "the taxpayer") [REDACTED] tax year. You asked for our assistance in determining whether withholding tax under I.R.C. §§ 1441 through 1446 is a partnership item. You also asked for our assistance in determining the proper person to execute a waiver to extend the statute of limitations for the partnership's [REDACTED] tax year. This case is part of the Coordinated Examination Program ("CEP").

ISSUES

1. Whether withholding tax under I.R.C. §§ 1441-1446 is a partnership item.

2. Who is the appropriate person to sign a waiver to extend the statute of limitations on assessment and collection with respect to the withholding tax liability of [REDACTED] from a Form 1042 that was filed by the partnership for the year [REDACTED].

CONCLUSION

1. Withholding tax under I.R.C. §§ 1441 through 1446 is probably a partnership item. However, because this issue has never been addressed by a court we suggest that you secure both a Form 872 and a Form 872-P in order to protect the Service's interests.

2. The Tax Matters Partner ("TMP") of the partnership or other person authorized in writing should sign the Form 872-P extending the period of limitations for the assessment of partnership and affected items at the partnership level. Similarly, any person who is authorized to act on behalf of the partnership can execute the Form 872. If the Forms are signed by someone other than the TMP, we strongly suggest that you obtain verification that the individual who executes the Forms has authority to bind the taxpayer.

FACTS

[REDACTED] was formed on [REDACTED] under the laws of the state of New York. The partnership has a total of [REDACTED] partners, which includes [REDACTED] limited partners and [REDACTED] general partner. The purpose of the partnership is to handle the [REDACTED] of the [REDACTED] play "[REDACTED]" ("the play").

The partnership's Form 1065 return for [REDACTED] states that the partnership's TMP is [REDACTED]. We have no information regarding the TMP's officers, directors and/or persons who are authorized to act on behalf of the TMP. The return was signed by [REDACTED] as General Manager. No information was provided on [REDACTED], his relationship to the TMP and/or his authority to act on behalf of the TMP and/or the partnership.

For the [REDACTED] tax year, the partnership filed a Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, which return was signed by [REDACTED] as General Manager. On this form, the partnership reported that it did not withhold any tax payments for the year. The only remaining issue in the Manhattan District's audit of the taxpayer is whether the taxpayer was required to withhold tax on payments made to the play's set and costume designers.

The play's costume and set designers are residents and citizens of [REDACTED]

[REDACTED] The partnership claims that it paid these individuals royalties. The Manhattan District is taking the position that the payments to these individuals were compensation for services and not royalties, therefore, the partnership was required to withhold tax on the payments. No further information was provided regarding this proposed adjustment. We, therefore, make no assertions or representations regarding the correctness of any proposed adjustment. Additionally we make no representations regarding the character of the payments at issue. Once additional facts are developed, we suggest that you contact our office for a determination on whether the payments are subject to section 1441.

DISCUSSION

Issue 1

It appears that withholding tax under I.R.C. § 1441-1446 is a partnership item. However, this issue has never been addressed by a court. Therefore, in order to protect the Service's interest, we suggest that you secure two waivers from the taxpayer, a general waiver (Form 872) and a waiver for partnership items (Form 872-P).

In general, a partnership item is any item more appropriately determined at the partnership level than at the partner level. I.R.C. § 6231(a)(3). Under the regulations, partnership items include income, gain, loss, deductions, credits, nondeductible expenditures, tax preference items, exempt income, partnership liabilities and assets, investments, transactions and operations necessary to determine investment credit or its recapture, amounts at risk, the oil and gas depletion allowance, and the application of § 751(a) and (b). See Treas. Reg. § 301.6231(a)(3)-1(a)(1)(i)-(iv). They also

include determinations affecting such items. Treas. Reg. § 301.6231(a)(3)-1(b).

I.R.C. § 1441 provides for the withholding at a flat rate of 30% on the gross amount of income from U.S. sources paid to nonresident aliens, foreign partnerships and foreign corporations, if certain requirements are met. See I.R.C. §§ 1441, 1442; Treas. Reg. § 1.1441-2. All persons having the control, receipt, custody, disposal or payment of any of the items of income subject to withholding of any nonresident alien individual or of any foreign partnership must deduct and withhold from the items the 30% tax (the "withholding agent"). I.R.C. § 1441(a); Treas. Reg. § 1.1441-7. The withholding agent is also responsible for filing the returns prescribed under Treas. Reg. § 1.1461-1. Every withholding agent must file an annual return on Form 1042 on tax required to be withheld. The return must be filed even if no tax had to be withheld. I.R.C. § 1461 provides that every person required to withhold such tax is liable for such tax.

It appears that withholding tax under I.R.C. § 1441-1446 is an item more appropriately determined at the partnership level. All of the facts necessary to determine if the partnership had control, receipt, custody, disposal or payment of any of the items of income subject to withholding of any nonresident alien are in the partnership's control. In addition, the partnership, as the withholding agent, is required to deduct and withhold tax and file the Form 1042 return. However, this issue has never been addressed by a court. Therefore, in order to protect the Service's interests, we suggest that you obtain two waivers from the taxpayer, a general waiver (Form 872) and a waiver for partnership items (Form 872-P).

Issue 2

As stated in Issue 1, above, because the issue of whether withholding tax under sections 1441 to 1446 has never been addressed by a court, we suggest that you secure two waivers from the taxpayer, a general waiver (Form 872) and a waiver for partnership items (Form 872-P). The TMP or other person authorized in writing should execute the Form 872-P. Similarly, any person who is authorized to act on behalf of the partnership can execute the Form 872. If the Forms are signed by someone other than the TMP, we strongly suggest that you obtain verification that the individual who executes the Forms has authority to bind the taxpayer.

Form 872-P

The general rule of I.R.C. § 6229(a) is that the period for assessing any tax imposed by subtitle A attributable to partnership or affected items shall not expire before 3 years after the later of the date the partnership return was filed or the last day for filing such a return (determined without regard to extensions). The period of limitations for assessment under section 6229(a) may be extended by agreement pursuant to section 6229(b). Form 872-P (Consent to Extend the Time to Assess Tax) is the form generally used by the Service to extend the statute of limitations on assessment regarding partnerships.

A consent to extend the period of limitations for the partnership executed at the entity level extends the period of assessment on all investors. The TMP or other person authorized in writing by all general partners of the key partnership may extend the period of limitations for the assessment of partnership and affected items at the partnership level for all partners. Temp. Treas. Reg. § 301.6229(b)-1T. The preferred way for extending the statute of limitations under section 6229 is by the TMP entering into the agreement.

The Code also provides for any other person authorized by the partnership in writing to enter into such an agreement to extend the period for all partners. Temp. Treas. Reg. § 301.6229(b)-1T provides that the following requirements should be met for such person to extend the statute: a statement must be filed with the Service Center where the partnership return is filed and it must: (1) provide that it is an authorization for such person other than TMP to extend the assessment period with respect to all partners; (2) identify the partnership and person being authorized by name, address and taxpayer identification number; (3) specify the partnership's taxable year or years for which the authorization is effective; and (4) be signed by all persons who were general partners at any time during the year or years for which the authorization is effective. Compliance with this regulation is not the exclusive method to designate. See Cambridge Research and Development Group v. Commissioner, 97 T.C. 287 (1991) (Designation as the general partner in a partnership agreement constitutes an authorization in writing to extend the period of limitation under Connecticut state law).

The regulations under I.R.C. § 6229(b) do not specify who in a corporation that is a TMP may sign consents executed under that section. Rev. Rul. 83-41, 1983-1 C.B. 349, provides that the Internal Revenue Service will generally apply the rules

applicable to the execution of original returns to consents to extend the period of limitation for assessment. Thus, the rules applicable to the execution of corporate income tax returns are used to determine which individuals are authorized to sign a consent for a corporation that is the TMP in a partnership to extend the statute of limitations on assessment of any tax with respect to any person which is attributable to any partnership item (or affected item) for a partnership year.

I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return on behalf of the corporation. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return.

[REDACTED] filed a Form 1065 return for its [REDACTED] tax year. This return states that the partnership's TMP is [REDACTED]. Accordingly, the signature portion of the Form 872-P should appear as follows:

Under penalties of perjury, I declare that I am not currently in bankruptcy nor have I previously been named as a debtor in bankruptcy proceeding in which the United States could have filed a claim for income tax due with respect to any partnership taxable year covered by this consent.

[REDACTED]
(E.I.N. [REDACTED])

[REDACTED]
Tax Matters Partner

Sign Here _____

(Date signed)

Please note that if an authorized individual other than the TMP signs the Form 872-P, you must attach to the Form 872-P written authorization of the individual's authority to bind the partnership and its partners. See Instructions to Form 872-P.

Form 872

Section 6501(c)(4) of the Internal Revenue Code provides that the IRS and a taxpayer may enter into an agreement to extend the time in which to assess tax. The regulations under 6501(c)(4) do not specify who may sign consents under that section. Accordingly, the Service will generally apply the rules applicable to execution of the original returns to consents to extend the time to make assessments. Rev. Rul 83-41, 1983-1 C.B. 349. In the case of a corporation, the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act, whether or not that person was the same individual who signed the return, may sign the statute extension. See I.R.C. § 6062. No facts were provided with respect to the officers of the TMP or those individuals who are authorized to act on behalf of the partnership. Therefore, we strongly suggest that you obtain verification that the individual who executes the consent has authority to bind the taxpayer.

Please telephone Maria Stabile at (212) 264-5473 x211 for further assistance.

LINDA R. DETTERY
District Counsel

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